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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/640,086	08/13/2003	Henry P. Gabryjelski	MSI-499USC1	7653
22801	7590	01/27/2006	EXAMINER	
LEE & HAYES PLLC 421 W RIVERSIDE AVENUE SUITE 500 SPOKANE, WA 99201			PSITOS, ARISTOTELIS M	
			ART UNIT	PAPER NUMBER
			2656	

DATE MAILED: 01/27/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>		<b>Applicant(s)</b>	
	10/640,086		GABRYJELSKI, HENRY P.	
	<b>Examiner</b>		<b>Art Unit</b>	
	Aristotelis M. Psitos		2656	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 13 August 2003.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-15 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-15 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

***Priority***

It is noted that this application appears to claim subject matter disclosed in prior Application No. 09/531236 filed 3/21/2000. Although there is reference to a prior application as the first sentence(s) of the specification of this application or in an application data sheet (37 CFR 1.76), such information needs to be updated/filled in properly.

If applicant intends to rely on the filing date of the prior application under 35 U.S.C. 119(e), 120, 121, or 365(c). See 37 CFR 1.78(a). For benefit claims under 35 U.S.C. 120, 121, or 365(c), the reference must include the relationship (i.e., continuation, divisional, or continuation-in-part) of all nonprovisional applications. If the application is a utility or plant application filed under 35 U.S.C. 111(a) on or after November 29, 2000, the specific reference to the prior application must be submitted during the pendency of the application and within the later of four months from the actual filing date of the application or sixteen months from the filing date of the prior application. If the application is a utility or plant application which entered the national stage from an international application filed on or after November 29, 2000, after compliance with 35 U.S.C. 371, the specific reference must be submitted during the pendency of the application and within the later of four months from the date on which the national stage commenced under 35 U.S.C. 371(b) or (f) or sixteen months from the filing date of the prior application. See 37 CFR 1.78(a)(2)(ii) and (a)(5)(ii). This time period is not extendable and a failure to submit the reference required by 35 U.S.C. 119(e) and/or 120, where applicable, within this time period is considered a waiver of any benefit of such prior application(s) under 35 U.S.C. 119(e), 120, 121 and 365(c). A benefit claim filed after the required time period may be accepted if it is accompanied by a grantable petition to accept an unintentionally delayed benefit claim under 35 U.S.C. 119(e), 120, 121 and 365(c). The petition must be accompanied by (1) the reference required by 35 U.S.C. 120 or 119(e) and 37 CFR 1.78(a)(2) or (a)(5) to the prior application (unless previously submitted), (2) a surcharge under 37 CFR 1.17(t), and (3) a statement that the entire delay between the date the claim was due under 37 CFR 1.78(a)(2) or (a)(5) and the date

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the claim was filed was unintentional. The Director may require additional information where there is a question whether the delay was unintentional. The petition should be addressed to: Mail Stop Petition, Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313-1450.

If the reference to the prior application was previously submitted within the time period set forth in 37 CFR 1.78(a), but not in the first sentence(s) of the specification or an application data sheet (ADS) as required by 37 CFR 1.78(a) (e.g., if the reference was submitted in an oath or declaration or the application transmittal letter), and the information concerning the benefit claim was recognized by the Office as shown by its inclusion on the first filing receipt, the petition under 37 CFR 1.78(a) and the surcharge under 37 CFR 1.17(t) are not required. Applicant is still required to submit the reference in compliance with 37 CFR 1.78(a) by filing an amendment to the first sentence(s) of the specification or an ADS. See MPEP § 201.11.

#### ***Information Disclosure Statement***

The IDS of 8/13/03 has been received and made of record.

#### ***Claim Objections***

Claim 11 is objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claim(s), or amend the claim(s) to place the claim(s) in proper dependent form, or rewrite the claim(s) in independent form.

If applicants' are of the opinion that the claim is an independent claim, then the claim should be re-written in independent form and appropriate fee payment thereof.

In claim 10, line 3 the word "to" in the phrase ---- between to adjacent ----- is interpreted as --- two ----- . If this is incorrect further elaboration is respectfully required.

#### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g.,

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In re Berg, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); In re Goodman, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); In re Longi, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); In re Van Ornum, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); In re Vogel, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and In re Thorington, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

1. Claims 1 and 2; 10; 13 and 11 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 11/7/6/1; 12/11/9/6, 26, 23/22 respectively of U.S. Patent No. 6639878. Although the conflicting claims are not identical, they are not patentably distinct from each other because:

see the following analysis:

pending claim

6639878/patent claim(s)

A method comprising:

reading at least a subset of audio

content comprising an audio file from

optical media removably integrated with an optical drive;

and

analyzing at least the read subset of audio content

to quantify optical drive read accuracy; and

generating one or more metrics of optical drive

read accuracy based, at least

in part, on the analysis of the read subset of

audio content.

A system comprising:

see claim 1, lines 2-3 and

sub-set in lines 4-9

analyze performed in lines

6-10 of claim 1

see line 7, generate

see dependent claim 11

as it depends upon 7/6

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In the above analysis, although the present claim is drawn to a method, and the patented claims are drawn to hardware – i.e., an apparatus, the method is met when the above apparatus operates. That is in order for the apparatus to perform the function/result defined in the above noted patented claims, the optical disc is read – reading the audio file (patent claim 1, lines 2-3), and the analyzing step.

With respect to the generating step as recited this occurs/taught defined by dependent claim 11.

Patented dependent claim 11, depends from patent claims 6 or 7. Claim 11 recites metric generation from such audio content. Since this claim 11/7/6/1 defines the noted hardware to perform the above function(s), the submission of claims drawn to the method is an obvious variation of the apparatus so claimed. (claims 6 & 7 present the inter-sector and intra-sector analyzer).

With respect to claim 2, the audio file is defined as part of an audio block and hence this limitations is also met.

With respect to claim 10, such is present/taught by patented claim 12/11/7/6.

With respect to claim 13, such is present/taught by patented claim 26, lines 1-5. The deletion of the wherein clause of claim 26 is either an obvious variant, i.e., size of audio pattern is not of patentable weight, since the “size” of the sampled signal is a function of the “size of the memory device used for performing the analyzing function/ i.e., memory size of any computer system. The ability to vary the size of the processor as a function of cost vs. reliability is an obvious variation to those of ordinary skill in the art.

With respect to claim 11, such is considered met by patent claim 23/22 as interpreted with claim 11 as analyzed above.

2. Claim 12 is rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 22 of U.S. Patent No. 6639878 in view of Official notice.

With respect to claim 12, the storage device as claimed is interpreted to be met by the readable medium defined in patented claim 22. The ability of using/having a computer system so

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as to operate on instructions contained/stored on a "storage device" such as an optical disc is considered well known to those of ordinary skill in the art.

It would have been obvious to modify the above noted claim with well known computer (pc) system so as to perform the appropriate instructions so as to properly read audio files stored on audio discs.

3. Claims 3-9 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 7/6/1, 9/7/6, 12/11/9/6 of U.S. Patent No. 6639878 further considered with Sethuraman. Although the conflicting claims are not identical, they are not patentably distinct from each other because as discussed in Sethuraman, such decoding capabilities for either inter- or intra sector correction(s) is well known – see entire document, and col. 1, line 15 to col. 2 line 44.

It would have been obvious to modify the base patented claims with the above additional intra and inter sector corrections in order to properly decode the desired information. The examiner interprets the term "sector" to be met by the disclosed term --- frame ----.

A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101, which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

4. Claims 13-15 are rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 16-27 of prior U.S. Patent No. 6,639,878. This is a double patenting rejection.

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As analyzed from the previous patented claims, claim 26 includes the limitations of pending claims 13 and 14, while patented claim 27 meets pending claim 15. With respect to claim 13 vs. claim 26, the examiner interprets the limitations of the wherein clause of patent claim 26 to be merely a desired result that follows from the subject matter positively recited, and as these limitations are present in pending claim 13, such limitations are also inherently present.

***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

7. Claims 1-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brewer et al further considered with either Yoshinaka or Hayashi.

Brewer et al discloses an optical disc information editing system for audio visual data, the ability of aligning audio sectors in accordance with a determination predicated upon a disclosed "tab error" – see abstract as well as col 1 line 1 to col. 5 line 20. The system's final operational parameters/operational settings are appropriately control by the overall system desired result – i.e., aligning the audio sectors/frames accordingly. The examiner interprets frames as sectors. There is no clear disclosure with respect to the claimed "generating one or more metrics" as recited in claim 1.

Either Yoshinaka or Hayashi disclose in this environment, the ability of generating “metrics” in their disclosed decoding systems – see branch metrics calculation in Yoshinaka or the Viterbi decoder in Hayashi.

It would have been obvious to modify the base system of Brewer et al with the above teaching from either of the secondary references, motivation is as discussed in either of the secondary references, the proper signal decoding capability and hence leading to correction of any misalignment of the audio sectors/information.

With respect to claim 2, the audio in Brewer et al is interpreted as an audio block.

With respect to claims 3,4,7 and 9, the amplitude difference is interpreted as present from either of the secondary references, i.e., the branch metric calculation of Yoshinaka or the Viterbi decoder of Hayashi. With respect to first and second bundle, the examiner interprets such as present by the discussion of the different types of audio information discussed in the primary reference to Brewer et al, i.e., “stereo” as provided basis for a first bundle (left of right channel) and a second bundle (right or left channel).

With respect to claims 5,6, and 8, i.e., the position of the first and second bundle, the examiner further considers such a placement, i.e., as claimed immediately adjacent to be met by normal stereo audio recordings, i.e., a left and right channel are normally immediately adjacent to each other.

With respect to claims 6 and 8 as they further recite control “one or more” operational settings, at least one is set by the overall combination of references as relied upon with the analysis of claim 1.

With respect to claims 11 and 13, and 15 the record medium in Brewer et al is interpreted as the claimed “machine readable”, and as further required by claim 15 – an optical medium.

With respect to claim 12, the overall system of Brewer et al is interpreted as a “computer” system, i.e., a storage device – the appropriate record medium being used/accessed, and the execution unit – the processor thereto.

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8. Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over the art as applied to claim 1 as stated in paragraph 8 above, and further in view of well known RLL/ or Huffman coding/decoding capabilities as further discussed in Sethuraman – see col. 1 lines 26-41.

It would have been obvious to modify the base system as relied upon above in paragraph 8 with the additional teaching from Sethuraman, motivation is as disclosed/taught therein, for proper intra-frame coding/decoding.

9. Claims 1 and 11-13 and 15 are rejected under 35 U.S.C. 103 (a) as being obvious over Ledermann further considered with Yoshinaka or Hayashi.

Ledermann discloses an optical medium playback system in which information is read, a particular tonal signal – interpreted as the claimed “subset of audio content”. Such subset is analyzed. There is no particular disclosure with respect to the remaining claimed limitation of generating one or more metrics of the drive accuracy based on such analysis. Although the system to Ledermann wants to detect “jitter” and such is predicated upon analyzing his subset of the audio content, there is no “metrics”.

Either Yoshinaka or Hayashi disclose in this environment, the ability of generating “metrics” in their disclosed decoding systems – see branch metrics calculation in Yoshinaka or the Viterbi decoder in Hayashi.

It would have been obvious to modify the base system of Ledermann with the above teaching from either of the secondary references, motivation is as discussed in either of the secondary references, the proper signal decoding capability and hence leading to correction of any misalignment of the audio sectors/information.

With respect to claim 11, since a readable medium is part and parcel of the base reference, this limitation is met. This claim is interpreted as presented herein – i.e., a dependent claim, but see the above objection thereof.

With respect to claims 12, 13 and 15 such are met by the above combination, i.e., an optical media as a machine readable medium having the appropriate plurality of information

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recorded thereon, as when read – as when desired to be used by a user – in the above overall system, appropriate one or more performance attributes/jitter for instance is appropriate quantifiably measured.

10. Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over the art as applied to claim 1 as stated in paragraph 9 above and further considered with Shen et al.

With respect to claim 2, the examiner interprets the information read as a block of audio. Furthermore, the ability of having and detecting audio blocks of different sizes is well known as further taught by the Shen et al reference.

It would have been obvious to modify the base system as relied upon above in paragraph 9 with respect to Ledermann and either Yoshinaka/Hayashi with the above teaching from Shen et al, motivation is to correct for appropriately sized audio blocks.

11. Claims 3-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over the art as applied to claim 2 above as stated in paragraph 10 above, and further in view of Brewer et al and the secondary references to either Yoshinaka or Hayashi.

In Brewer et al is interpreted as an audio block as well as stereo audio – i.e., a first and second bundle.

With respect to claims 3,4,7 and 9, the amplitude difference is interpreted as present from either of the secondary references, i.e., the branch metric calculation of Yoshinaka or the Viterbi decoder of Hayashi. With respect to first and second bundle, the examiner interprets such as present by the discussion of the different types of audio information discussed in the primary reference to Brewer et al, i.e., “stereo” as provided basis for a first bundle (left of right channel) and a second bundle (right or left channel).

With respect to claims 5,6, and 8, i.e., the position of the first and second bundle, the examiner further considers such a placement, i.e., as claimed immediately adjacent to be met by normal stereo audio recordings, i.e., a left and right channel are normally immediately adjacent to each other.

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With respect to claims 6 and 8 as they further recite control "one or more" operational settings, at least one is set by the overall combination of references as relied upon with the analysis of claim 1.

12. Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over the art as applied to claim 1 as stated in paragraph 9 above, and further in view of well known RLL/ or Huffman coding/decoding capabilities as further discussed in Sethuraman – see col. 1 lines 26-41.

With respect to claim 10, the ability of having inter-frame/sector control is considered met by the appropriate RLL or Huffman coding/decoding abilities for intra-frame alignment.

It would have been obvious to modify the base system as relied upon above in paragraph 8 with the additional teaching from Sethuraman, motivation is as disclosed/taught therein, for proper intra-frame coding/decoding.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Aristotelis M. Psitos whose telephone number is (571) 272-7594. The examiner can normally be reached on M-Thursday 8 - 3.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Hoa T. Nguyen can be reached on (571) 272-7579. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Aristotelis M Psitos  
Primary Examiner



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